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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 771

WILLIAM GART, ADA BASS, HARRY MYERS, SOPHIE BERGMAN, GEORGE KAY d/b/a Iconic Press, WILLIAM LOEBNER, HOWDIBON GARAGE CO. INC., SCHUCKMAN PRESS, INC., 145-147 W. 61st CORPORATION, individually and on behalf of all others similarly situated,

Petitioners,

against

ALBERT M. COLE, as Administrator, Federal Housing and Home Finance Agency, WALTER S. FRIED, as Regional Administrator, Region 1, Federal Housing and Home Finance Agency; CITY OF NEW YORK; ROBERT F. WAGNER, individually and as Mayor of the City of New York and a member of the Board of Estimate; ABE STARK, individually and as President of the City Council of the City of New York and a member of the Board of Estimate; HULAN E. JACK, individually and as President of the Borough of Manhattan, City of New York, and a member of the Board of Estimate; JAMES J. LYONS, individually and as President of the Borough of Bronx, City of New York, and a member of the Board of Estimate; JOHN CASHMORE, individually and as President of the Borough of Brooklyn, City of New York, and a member of the Board of Estimate; JAMES J. CRISONA, individually and as President of the Borough of Queens, City of New York, and a member of the Board of Estimate; ALBERT V. MANISCALCO, individually and as President of the Borough of Richmond, City of New York, and a member of the Board of Estimate; ROBERT MOSES, individually and as Chairman of the Committee on Slum Clearance of the City of New York; FORDHAM UNIVERSITY; LINCOLN CENTER FOR THE PERFORMING ARTS, INC.; and WEBB & KNAPP LINCOLN SQUARE CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT FORDHAM UNIVERSITY IN OPPOSITION

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April 8, 1959.

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Opinions Below

The opinion of the District Court is reported at 166 F. Supp. 129. The opinion of the Court of Appeals for the Second Circuit is reported at 263 F. 2d 244.

Constitution and Statutes Involved

The pertinent provisions of the Constitution (First Amendment), the Housing Act of 1949, as amended (63 Stat. 413, 414, 416, 420; 42 USC secs. 1441, 1451, 1452, 1455, 1460; 68 Stat. 622, 42 USC sec. 1450), are set forth in the petition as Appendix A.

Statement

Petitioners,* tenants and former owners of real property in the area covered by the Lincoln Square Title I Urban Renewal Project of New York City, seek to challenge the Project upon the alleged grounds that (1) the action of the Federal Housing and Home Finance Agency (hereafter "FHHFA") in approving the Project violated the First Amendment because of the participation of Fordham University, a denominational educational institution, and (2) the action of the Housing Administrator in declining to grant an oral hearing in 1957 to two** of the petitioners was in derogation of the Housing Act of 1949 (Pet. p. 2).

The Lincoln Square Project which petitioners seek to defeat is a slum clearance and urban renewal project covering a thirteen block slum area on the West Side of Manhattan in New York City. In determinations not here challenged, the duly constituted agencies of the City

* 145-147 W. 61st Corporation vacated its premises during the pendency of this action.

** Of the petitioners here, only two were parties to the petition to the Housing Administrator—Schuckman Press, Inc. and Howdibon Garage Co. Inc. As appears from the brief on behalf of the New York City officials, Schuckman Press has accepted from the City a check in full payment of its claim in the condemnation proceeding.

found the Lincoln Square area to be sub-standard and insanitary and, pursuant to Article XVIII of the New York Constitution and Section 72-k of the New York General Municipal Law, proceeded to devise a plan for elimination of the slum and rehabilitation of the area (App. below, pp. 34a-37a).

The procedure followed was precisely the same as that in every other slum clearance project in the City of New York and had been repeatedly sustained by the courts (*Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. den. 347 U. S. 934; *Matter of Murray* v. *LaGuardia*, 291 N. Y. 320, cert. den. 321 U. S. 771; *Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. 2d 293, aff'd 286 App. Div. 828, mot. for lv. to ap. den. 309 N. Y. 1029; *Boro Hall Corp.* v. *Impellitteri*, 128 N. Y. S. 2d 804, aff'd 283 App. Div. 889, mot. for lv. to ap. den. 307 N. Y. 672).

In fact, the very plan here challenged has been sustained in another action brought by the same counsel on behalf of other members of the same classes as petitioners (*64th St. Residences, Inc.* v. *City*, 4 N Y 2d 268, cert. den. *sub nom. Harris* v. *City*, 357 U. S. 907; 1957 Term, No. 1014).

The Project Plan called for inclusion of four basic site areas: a housing development, a performing arts center, an institutional area for which the sponsor is the American Red Cross, and a collegiate site to be redeveloped by an educational institution for such use (cf. *Berman* v. *Parker*, 348 U. S. 26, 34-35).

After public hearings before both the City Planning Commission and the Board of Estimate (pursuant to 42 USC, sec. 1455) the Project Plan was approved and submitted with the record of the hearings to the FHHFA which likewise approved.

Subsequently, the City acquired title to the Project area through condemnation, and at a public auction pursuant

to Section 72-k of the General Municipal Law, the sponsors successfully bid for their respective sites and title was conveyed to them (App. below, pp. 81a-82a).

The parcel acquired by Fordham University constitutes approximately 15% of the total Project area. Fordham proposes to locate thereon its downtown schools of law, education, business and social service.

Fordham is a New York educational corporation, administered by members of the Jesuit order, but whose faculty is not composed exclusively of either members of that order or persons of the Catholic faith. Throughout the 115 year history of Fordham, individuals of all races, colors and creeds have been, and will continue to be, included in its student body.

Prior Litigations

As noted by Chief Judge Clark "This is the fifth of a prolonged series of actions attacking the validity of the Lincoln Square Urban Renewal Project, a slum redevelopment project of the City of New York partially financed by federal funds under Title I of the Housing Act of 1949, 42 U.S.C. §§1441 *et seq.*" The chronology of these actions follows:

(1) In 1956, an action was commenced in the Supreme Court of New York to enjoin future acts processing the Project upon the ground, *inter alia*, that Fordham's participation in the Project was in violation of the Constitution. The plaintiffs were William Loebner (the same Loebner who is petitioner herein), suing as a taxpayer, and two others suing as tenants on behalf of themselves and all others similarly situated. The complaint was dismissed for prematurity, the court also noting his belief that the action had no merit (*Loebner v. City of New York*, 162 N. Y. S. 2d 233).

(2) In October, 1957, another plaintiff instituted an action in the New York Supreme Court attacking the Project upon substantially the same grounds asserted in the *Loebner* action. This action was also dismissed for prematurity (*89 Amsterdam Avenue Corp.* v. *City*, NYLJ, Nov. 13, 1957, p. 7).

(3) In December, 1957, a third complaint was filed in the Supreme Court which pleaded two causes of action—one by plaintiffs who alleged to be owners and taxpayers, the other by persons alleging to be tenants in the Project area. The tenant-plaintiffs expressly brought their action "on behalf of themselves and all others similarly situated", and it was clear that both alleged causes of action were in fact representative in character. The alleged basis for the relief sought was that the condemnation of the slum area and the sale to Fordham were void because they resulted in an unconstitutional grant of public monies to a denominational institution. The complaint was dismissed on the merits (*64th St. Residences, Inc.* v. *City*, 10 Misc. 2d 841; aff'd 5 A D 2d 824; aff'd 4 NY 2d 268, cert. den. *sub nom. Harris* v. *City*, 357 U. S. 907).

(4) On February 19, 1958, while the third action was pending, another group of tenants, again expressly suing on behalf of themselves and all others similarly situated, commenced a new action in the District Court for the Southern District of New York. The complaint in this action was substantially identical with the complaint in the *64th St. Residences* action, and was dismissed by Judge Dimock (*Cohen* v. *City of New York*). An appeal taken from this decision has not been prosecuted.

(5) On June 16, 1958, seven days after this Court denied the petition for a writ of certiorari in the *64th St. Residences* action (*sub nom. Harris* v. *City*) the present action

was commenced. Again the plaintiffs alleged the same grievance and sought substantially the same relief (except as to the new claim that they were entitled to an oral hearing before the Administrator) as in the *64th St. Residences* action.

It is not without significance that in each and every one of the foregoing five actions, the plaintiffs were represented by the same counsel.*

Argument

Although the petition states that it "is not directed to that portion of the judgment of the court below which affirmed the District Court's dismissal of the complaint as to these respondents [City of New York, Fordham, etc.] on the grounds that a judgment in a prior state court action [*64th St. Residences*] in which they were parties, was res judicata" (Pet. p. 3), petitioners nevertheless seek to relitigate the questions decided in that action by now urging that the action of the FHHFA in approving the Project was in violation of the First Amendment for the identical reason there urged, *viz.*, because of Fordham's participation (Pet. p. 2).

It is clear, however, that petitioners, as members of the classes represented by plaintiffs in the *64th St. Residences* action, are barred from relitigating issues raised in that action. The City's use of federal funds was discussed by the New York Court of Appeals in its opinion in that action, and was emphasized in the petition for certiorari to this Court (cf. Pet. in *Harris v. City*, pp. 3, 4, 11 *et seq.*). Since the New York courts would not suffer this

* Harris L. Present, Esq. has always been counsel of record, assisted by the firm of Dickstein, Shapiro & Friedman, except that Mr. Shapiro of that firm signed the petition for certiorari in the last case. Mr. Present's name appeared, however, as counsel, upon that petition (1957 term, No. 1014).

issue again to be litigated, the issue is likewise barred in the federal courts. The determination of the constitutionality of the expenditure of federal funds for the Project cannot depend upon whether the defendants in the action are city officials, as in the *64th St. Residences* action, or federal officials, who have been added as defendants in this action.

Although they concede "that the Housing Act specifies only a hearing before a local public agency" (Pet. p. 12), petitioners also claim that the Act requires that they be afforded a hearing before the FHHFA on their alleged objections to the relocation features of the Project Plan (Pet. p. 2). The Housing Act expressly provides for a public hearing, two of which were held in this case, before the local agencies (42 USC sec. 1455). Petitioners' counsel appeared and was heard at length at both. But nowhere is an oral, or any other type of hearing, required or authorized before the Federal Administrator. It was the congressional intent, expressed in the Housing Act, that the local authorities in the area where the slum clearance project is to be undertaken, rather than federal officials, are to be responsible for determining the area which is to be the subject of the redevelopment plan, and for devising a workable plan and method of relocation (U. S. Code Congressional Service, 83rd Cong., 2nd session, 1954, pp. 2758-2759; 2762-2763).

Next petitioners try to read into the language of section 5 of the Administrative Procedure Act (5 USC sec. 1004) a requirement of a hearing. Section 5 requires a hearing only when there is an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." The section has been held to apply only to hearings required by statute or greater authority (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50).

No hearing before the Administrator was required here by either Constitution or statute; and it is also clear that the Administrator here made no "adjudication" such as is contemplated by the Administrative Procedure Act.

In any event, we submit that in accepting and considering the written petition and supporting brief filed on behalf of those who sought an oral hearing before him, the Administrator demonstrated his willingness to consider petitioners' papers in reaching the conclusion, which rests in his discretion, required of him by the Housing Act.

I

The Decision Below is Clearly Correct

a) Fordham's participation in the urban renewal project does not violate the First Amendment.

(i) *Petitioners are barred from relitigating this issue.*

The complaint in the *64th Street Residences* (*Harris* v. *City*) action makes clear that the action was, even apart from the fact that counsel so designated it, a traditional class action (*Ashton* v. *Rochester*, 133 N. Y. 187; *People's Gas & Electric Co.* v. *Oswego*, 207 App. Div. 134, aff'd 238 N. Y. 606). The present action, both in designation and in fact, is similarly a class action.

As Judge Clark said: "There is no dispute here that the claims asserted in this action against defendants other than Cole and Fried are identical with those unsuccessfully raised against these same parties in the prior New York action" (Pet. App. B. p. 29).

The sole difference is that defendants in the prior action included local governmental officials whom plaintiffs sought to enjoin, while the present action also names as defendants officials of the FHHFA.

It is clear that plaintiffs in the prior action, and petitioners herein, have common interests and an identical grievance; it is also clear that the same counsel appears for both groups.

The courts below were, therefore, correct in holding that (1) the New York Courts in the prior action had jurisdiction of the subject matter; (2) petitioners, as members of the classes of plaintiffs in the prior action, were barred by the judgment therein from relitigating the same issues in the state court; (3) the Full Faith and Credit clause of the Constitution and the legislation thereunder require the federal courts to give the same effect to the state court judgments (*American Surety Co.* v. *Baldwin*, 287 U. S. 156; *Magnolia Petroleum Co.* v. *Hunt*, 320 U. S. 430).

If the First Amendment (through the Fourteenth Amendment) was not violated (and the courts so held in the prior action) by the action of the local officials, the First Amendment—which applies equally to the state and federal governments (*Zorach* v. *Clauson*, 343 U. S. 306; *Everson* v. *Board of Education*, 330 U. S. 1; *Cantwell* v. *Connecticut*, 310 U. S. 296)—cannot be violated by the same alleged facts, merely because federal officers are named as defendants. Since the New York courts would not permit petitioners to relitigate this issue, petitioners are barred likewise in the federal courts (*Israel* v. *Wood Dolson Co.*, 1 N Y 2d 116; and see *Kessler* v. *Eldred*, 206 U. S. 285).*

* It is of interest that the same procedure was attempted by the objectants to the Washington Square Project. That case was litigated in the state courts (*Bleecker Luncheonette* v. *Wagner*, 141 N. Y. S. 2d 293, aff'd 286 A. D. 828, mot. lv. ap. den. 309 N. Y. 1029), and then an action was commenced in the federal court seeking to enjoin the Housing Administrator. The United States Court of Appeals for the District of Columbia affirmed the dismissal of that complaint (*Allied City Wide, Inc.* v. *Cole*, 230 F. 2d 827).

(ii) *There is no substance to petitioners' argument, even if the merits are reached.*

In the petitions for certiorari in both the present and prior actions, petitioners allege identical reasons to support their assertion that the Housing Act, as applied to the Lincoln Square Project, is unconstitutional because of the participation of Fordham University.

These petitioners assert, as did those before them speaking through the same counsel, that there is a subsidy to Fordham, and that the determination to have an educational area in the urban renewal project was made solely for the benefit of Fordham. The first claim is false in law and fact, and the second is untrue. Judge Desmond's opinion in the prior action (which we have annexed hereto as Appendix A) is lucid upon this (4 N Y 2d 268, 275-6):

> "Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the

$7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

"Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no 'aid to religion' is involved and a religious corporation cannot be excluded from bidding."

Further, as to the propriety of establishing an educational area in a project such as this, this Court has noted that "The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets and shopping centers" (*Berman* v. *Parker*, 348 U. S. 26, 34-35).

Beyond this, it is clear that petitioners here seek to challenge the action of the Administrator in authorizing the expenditure of federal funds pursuant to an Act of Congress. The courts have consistently held that petitioners such as these lack standing to question the propriety of the expenditure of federal funds, and the courts will not interfere with the acts of an administrator concerning such expenditures (*Massachusetts* v. *Mellon*, 262 U. S. 447; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Allied-City Wide Inc.* v. *Cole*, 230 F. 2d 827).

There is no need here to restate further and at length the lack of merit to petitioners' claims with respect to the First Amendment (see the papers in *Harris* v. *City*, 357 U. S. 907; 1957 Term, No. 1014).

b) Petitioners have no statutory or other right to an oral hearing before the FHHFA.

Petitioners in their "questions presented" (Pet. p. 2) ask this Court to pass upon the question "Whether under the provisions of Title I of the Housing Act of 1949, 63 Stat. 413, as amended, 42 U.S.C. Sections 1441 *et seq.*, tenant petitioners had a right to be heard and present testimony before the Federal Housing and Home Finance Agency in support of their objections to the relocation plan of the Lincoln Square Urban Renewal Project?"

The first point of inquiry is the Housing Act itself. That the Act neither requires, nor contemplates, a hearing —much less an oral hearing—before the federal agency is admitted in the petition, where at p. 12 it is stated that "• • • it is true that the Housing Act specifies only a hearing before a local public agency"*.

* The footnote reference (Pet. p. 12) to 72 Harvard Law Review. 504, 515 contributes nothing to the issue here, but is illuminating because of its source. The students who wrote the note cite as an authority a statement made to them by petitioners' counsel! (*idem* p. 515).

It provides that "No land for any project to be assisted under this subchapter shall be acquired by the local public agency except after public hearing following notice of the date, time, place, and purpose of such hearing" (42 USC, sec. 1455(d)).

Two hearings were held, one before the New York City Planning Commission, the other before the Board of Estimate, and counsel for petitioners appeared at both and presented his contentions at length orally (App. below, p. 18a).

It is also clear that there was deliberate and sound reason behind the determination of Congress to require a hearing at the local level, without duplication thereof before the FHHFA. The purpose of Congress was to encourage and assist local governments to clear slums and blighted areas. Thus, for example, 42 USC, sec. 1452(d)] authorizes the Administrator to "make advances of funds to *local public agencies* for surveys of urban areas to determine whether the undertaking of urban renewal projects therein may be feasible • • •." (emphasis supplied). Basically the purpose and intent of the Act is that the local authorities initiate and undertake slum clearance projects.

"The bill provides that *local community must present* to the Housing Administrator a workable program for eliminating and preventing slums and urban blight, and the Administrator must have approved *the local program* before Federal aid will hereafter be made available to the community • • •. The workable program requirement seeks a bona fide and practical expression of the community's own projected program to deal with its own problems • • •" (U. S. Code Congressional Service, 83rd Cong., 2nd Session, 1954, pp. 2758-2759, S. Rep. No. 1472, emphasis supplied; and see, U. S. Code Congressional Service, 81st Cong., 1st Session, 1949, p. 1551, S. Rep. No. 84).

The Administrator makes loans or grants funds to local bodies within his discretion (42 USC, secs. 1451, 1452) and within limits set by Congress, but he neither initiates a project, determines the location of such project, nor does any of the basic planning therefor. This is all done at the local level, pursuant to the legislative purpose.

It is thus proper and consistent with orderly procedure that the hearing on the proposed plan be at the local level where the plans for the project are formulated and carried out. The Administrator determines whether the local plan submitted to him presents "a workable program" (42 USC, sec. 1451), either approving or disapproving the plan developed by the local agencies. There is no occasion for an additional repetitive hearing before the Administrator.

Nevertheless, those who petitioned the Administrator in the Lincoln Square Project were permitted to present their views. This they did by submitting a petition and a lengthy brief (43 pages) and appendix, containing facts and figures allegedly supporting their claims, signed by counsel for the present petitioners. It is of record (App. below, p. 68a) that counsel was told that the "information furnished by you will be considered with other documentation when the application" is considered.

An oral hearing before the Administrator was not required.

The cases cited where federal administrators were required to make quasi-judicial "adjudications" which affect private rights (Pet. p. 15) do not support petitioners' assertions. Here the Administrator's action was only to determine whether the Congressional standard for the expenditure of federal funds had been met by the local

agencies. There was no "adjudication," much less one as is contemplated by the cases cited.

Section 5 of the Administrative Procedure Act (5 USC, sec. 1004) not only does not support petitioners' claims, but demonstrates that the challenged decision made by the Administrator here is not the type as to which a hearing is required. That Section refers to an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." This Court has held the quoted language as pertaining to hearings required by statutory or greater authority (*Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 50).

Here, the Housing Act requires no hearing before the Administrator. Further, no "adjudication" directly affecting private rights and interests, such as is contemplated by the Administrative Procedure Act; was made, or could be made, by the Administrator. He had nothing to do with the planning of the Project or the determination of its boundaries or of the properties to be affected, all of which were committed by Congress to the local authorities, which gave full hearings. Nor does the act of the Administrator divest any person of property.* All the Administrator was empowered to determine was whether the plan as a whole, and as approved by local authorities after hearings, should, or should not receive a federal grant.

In each of the cases cited by petitioners (Pet. pp. 13-14) there was a quasi-judicial adjudication directly concerning the private right, statutory or constitutional, of an individual, such as his right to use the mails; the deportation of an alien; or the right of a common carrier to a certificate of public convenience. Here the Administrator only

* It is the act of condemnation by the local authorities, and not any act of Federal officers or agencies, that divests the title or interest of private persons to property in the slum area; and this, of course, can only be constitutionally done upon payment of just compensation.

determined that the local plan met Congressional requirements. There is neither statutory nor constitutional requirement, express or implied, that an oral hearing must be afforded in such case (see concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 167).

Further, the fact that the Administrator reached his conclusion without having an oral presentation by counsel for petitioners, does not mean that the Administrator's decision was made without sufficient basis in fact to support it.

Petitioners' contention (Pet. p. 14) that the Administrator's "sole reliance" on the plan and papers submitted to him by the City made his determination arbitrary, is capable of being proved conclusively incorrect both in fact and in law. First, it is of record (App. 68a) that the voluminous documents submitted by counsel for petitioners to the Administrator "will be considered with other documentation". Secondly, as we have seen, the function delegated to the Administrator by Congress is to decide if the *City's* plan is workable. To do this, the Administrator must basically consider the documentation submitted to him by the City in question. Congress left to the cities, as we have seen, the primary responsibility for slum clearance.

The two present petitioners-tenants who requested an oral hearing waited a year and a half after their request was rejected—during which the slum clearance project progressed, and substantial monies and effort were expended—before commencing this action. During this delay, the slum area was condemned, the property was sold to the redevelopers, and redevelopment began. This unjustified delay clearly precludes petitioners from now attempting to halt the progress of the slum clearance plan (*Hays* v.

Port of Seattle, 251 U. S. 233, 238-9). Especially should this be true where, as here, these petitioners are represented by the same counsel who challenged this project throughout, and it was only after all other means of attack failed that the present theory was advanced in a new lawsuit.

II

There is no important question of Federal law.

As to the first point argued by petitioners, *viz.*, that the presence of Fordham in the slum area to be redeveloped violates the First Amendment, petitioners are bound by the judgment in the prior class action (*64th St. Residences, Inc.* v. *City of New York*, 4 N Y 2d 268, cert. den. *sub nom. Harris* v. *City*, 357 U. S. 907, 1957 Term, No. 1014). And even if the merits of petitioners' claims can be reached, the same reasons which prompted this Court to deny certiorari when this same claim was first presented (*Harris* v. *City*, *supra*) should again indicate the same conclusion.

As to the denial of the alleged right of some of the petitioners to an oral hearing in support of the petition and written brief submitted in their behalf to the Administrator, we have demonstrated that there is neither statutory nor constitutional requirement—nor sound reason—for such a hearing.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

April 8, 1959.

Respectfully submitted,

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APPENDIX A

Opinion per Desmond, J.

64TH ST. RESIDENCES v. CITY OF NEW YORK, 4 N Y 2d 268.

DESMOND, J. Plaintiffs are owners and tenants of real property in the so-called "Lincoln Square Project" area on the west side of Manhattan running from 60th Street to 70th Street, bounded on the east and west by various streets and consisting altogether of 13 city blocks. Beginning in 1954, by appropriate actions of various of its public officers and bodies, the city, as authorized by section 1 of article XVIII of the State Constitution and section 72-k of the General Municipal Law (see *Kaskel* v. *Impellitteri*, 306 N. Y. 73, cert. denied 347 U. S. 934), found the Lincoln Square area to be "substandard and insanitary", approved a plan for renewal thereof and ordered its acquisition by the city through condemnation. To secure a grant of Federal moneys pursuant to the National Housing Act (U. S. Code tit. 12, § 1701 *et seq.*), the city's Board of Estimate presented to the Federal Urban Renewal Administration the city's proposal for the "Lincoln Square Urban Renewal Project". Before such presentation the city had obtained and had included in the plan agreements by various "sponsors". Among those sponsors are intervenors Fordham University and Lincoln Center for the Performing Arts, Inc., a newly formed membership corporation with the principal function of promoting the musical and dramatic arts.

Each such sponsor agreed, as part of the Urban Renewal Plan, to bid, at the auction provided for by section 72-k of the General Municipal Law, a stated minimum price and, if it should be the successful bidder, to relocate the prior occupants, clear its part of the site and redevelop

that part as required by the plan, with buildings to be approved by the city. Fordham University agreed as such sponsor to bid, for the two-block part set aside for "educational purposes", at least $2,241,610, or $7 per square foot, which was higher than the "re-use value" fixed by any of several appraisals. The city on its part agreed to acquire that allotted part (as well as the rest of the area) by condemnation, and, if Fordham University should be successful at the auction, to convey that part to the university at the auction price. Other sponsors made separate agreements which need not be described in detail. The Federal Housing and Home Finance Agency then approved the whole project and plan. The consequence of such approval is, under the Federal statutes (U. S. Code, tit. 42, § 1450 *et seq.*), that the Federal Government will pay two thirds of the difference between what the city pays for this land and the amount realized at the auction. The city itself must stand the other third.

After the plan had been approved, as above described, plaintiffs brought this present suit to invalidate the plan and to enjoin the city from carrying it out. The theory of the complaint is that the resale of part of this area to Fordham University, a Roman Catholic institution, at a price lower than the price paid for that part by the city will be a direct subsidy of a sum in excess of $3,500,000 in violation of section 7 of article I of the New York State Constitution and of the First and Fourteenth Amendments to the United States Constitution, each of which constitutional provisions, say plaintiffs, forbids grants of public moneys to denominational institutions. After the institution of this suit the city, on February 28, 1958, took title to the project area by condemnation and conducted the

auction at which Fordham University was the only bidder (at the previously negotiated price) for that part of the area which had been reserved for collegiate or educational purposes. Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action, at least as praying for a declaratory judgment.

Special Term denied the motion of plaintiffs for a temporary injunction and for summary judgment and granted the motion of the defendants and intervenors under rules 112 and 113 of the Rules of Civil Practice for dismissal of the complaint on the ground that it does not state a cause of action. Appellate Division, First Department, unanimously affirmed without opinion, judgment of dismissal was entered thereon, and plaintiffs appeal to this court as of right, presumably on constitutional grounds (Civ. Prac. Act, § 588, subd. 1, par. [a]).

Plaintiffs say that the condemnation of this land and the sale thereof to the university is completely void because Fordham is a denominational school and the sale to it, according to plaintiffs, at $7 per square foot of land for which the city will pay an estimated cost of about $16 per square foot would thus be an unconstitutional grant or subsidy of public moneys to a religious corporation. The argument, however, proceeds on an assumption false in fact. Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the ten-

ants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land. There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.

Any collegiate institution could have been a bidder at the auction. Special Term pointed out, probably correctly, that Fordham would be deprived of constitutional rights if it alone were excluded from the bidding. Perhaps this is only another way of saying that, since this sale is an exchange of considerations and not a gift or subsidy, no "aid to religion" is involved and a religious corporation cannot be excluded from bidding.

Appendix A

At some points in their argument plaintiffs seem to be questioning the validity of the whole system of selling these properties at auctions where there is little likelihood of competing bids. That contention must be rejected (see *Kaskel v. Impellitteri*, 306 N. Y. 73, 95, *supra*—dissenting opinion, but representing the whole court's views on that question; and see *Bleecker Luncheonette v. Wagner*, 286 App. Div. 828, motion for leave to appeal denied 309 N. Y. 1029).

The judgment should be affirmed, with costs.

Chief Judge Conway and Judges Dye, Fuld, Froessel, Van Voorhis and Burke concur.

Judgment affirmed.